UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SSA PACIFIC, INC. Respondent, and	
RONI SIMISOLA, an Individual JOHN STUBBE, an Individual ALAN COUCH, an Individual An Individual.	Case No. 20-CA-151433 Case No. 20-CA-156741 Case No. 20-CA-156786
PACIFIC MARITIME ASSOCIATION Respondent, and	
RONI SIMISOLA, an Individual JOHN STUBBE, an Individual ALAN COUCH, an Individual	Case No. 20-CA-153169 Case No. 20-CA-156732 Case No. 20-CA-156792
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION LOCAL 18 Respondent, and	
RONI SIMISOLA, an Individual JOHN STUBBE, an Individual ALAN COUCH, an Individual	Case No. 20-CB-151490 Case No. 20-CB-156767 Case No. 20-CA-156787

REPLY BRIEF OF RESPONDENT PACIFIC MARITIME ASSOCIATION IN SUPPORT OF CROSS-EXCEPTIONS

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Counsel for Respondent
Pacific Maritime Association

In its Cross-Exceptions, Respondent Pacific Maritime Association ("PMA") excepted, *inter alia*, to the Administrative Law Judge's (the "ALJ's") conclusion that Identified Casual Rule #12 ("Rule 12"), which prohibits casual longshore workers from "causing a disturbance at the Dispatch Hall or at any other job-related area," is an overbroad rule that unlawfully restricts employees from engaging in dissident union activities. GC Ex. 14 (Identified Casual Rule #12). Specifically, PMA urged that the ALJ erred (1) by reading Rule 12 to prohibit peaceful, dissident union activities that do not actually disrupt the dispatch process or work at the Port; and (2) by failing to interpret Rule 12 in the context of the collective-bargaining agreement, including its no-strike clause. *See* PMA's Brief in Support of Cross-Exceptions at 7.

In his Answering Brief to Respondent PMA's Cross-Exceptions, the General Counsel (the "GC") argues that Rule 12 is "patently" overbroad, that it is ambiguous, and that it is confusing. The GC unreasonably reads Rule 12 to prohibit "complaints, grievances, and even questions and requests regarding Respondents' dispatching operation"; or to prohibit the "distribution of flyers protesting nepotism in dispatch, bargaining positions taken by the Union in negotiations, the incumbent slate of Union officers, or the operation of the job referral system"; or even to prohibit the "circulation of a decertification petition." GC's Answering Brief at 3, 4.[1]

There are at least three major problems with the GC's argument. First, it is an unreasonable reading of Rule 12, which plainly does not prohibit peaceful, dissident union speech. Second, the GC's argument ignores the purpose and collective bargaining context of the rule, which has nothing to do with dissident union speech. Third, the GC's argument is contrary to the ALJ's findings that Rule 12 (a) is *not* unlawfully overbroad as applied to longshore worker

[1] References to the GC's Answering Brief to Respondents' Cross-Exceptions to the Decision of the ALJ is referred to herein as the "GC's Answering Brief." References to the Transcript will be denoted as "Tr. X:Y," where "X" is the page number and "Y" denotes the line number. References to the General Counsel's exhibits will be denoted as "GC Ex. X." References to Respondent PMA's exhibits will be denoted as "PMA Ex. X," and references to the Union's exhibits will be denoted as "U. Ex. X." Finally, references to the ALJ's Decision will be denoted as "ALJD X:Y," where "X" denotes the page number and "Y" denotes the line number.

activity in the dispatch hall while the dispatch process is ongoing; and (b) has *not* been applied to restrict longshore workers' protected concerted activities. The GC did not, however, except to these findings with respect to Rule 12 and, as a result, the GC's arguments are waived to the extent they are inconsistent with the ALJ's findings.[2]

I. Rule 12 Does Not Prohibit Peaceful, Dissident Union Speech.

By interpreting Rule 12 to encompass peaceful, non-disruptive speech, as opposed to conduct that is actually disruptive of the dispatch process or port operations, the GC's argument does not comport with the standard of "reasonableness" that must be applied when interpreting a work rule under *Lutheran Heritage Village-Livonia*. 343 NLRB 646, 646 (2004) (in determining whether a rule is unlawful, the Board must give the rule a reasonable reading and determine whether employees would reasonably construe the language to prohibit Section 7 activity). The Board *must* give the rule a "reasonable" reading, *must* refrain from reading phrases in isolation,

[2] Citing *Wolf Trap Foundation*, 287 NLRB 1040 (1988), the GC argues that PMA and SSA must be held liable for the alleged unlawfulness of Rule 12 because "PMA and SSA play an equal role with the Union in operating the joint dispatch hall and maintaining the unlawful rule." GC's Answering Brief at 2, n.1. The GC's argument in this regard is gratuitous, ill-considered, and entirely inappropriate as neither SSA nor PMA has argued that it did nothing to maintain Rule 12 and should not be held liable if Rule 12 is unlawfully overbroad. Because this issue was not raised by PMA in its Cross-Exceptions, the GC is precluded from now raising it. *See* NLRB Rules & Regulations § 102.46(d)(2) ("[t]he answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof."). Even if it had been raised, which it was not, *Wolf Trap* would not apply under the facts of this case because *Wolf Trap* concerns the issue of derivative liability of an employer for the conduct of a union. 287 NLRB at 1040. Here, PMA is directly liable for the creation and administration of Rule 12, as PMA, on behalf of its members employing Identified Casuals in the Port of West Sacramento, agreed to Rule 12 and agreed to apply it to the circumstances of this case. *See* PMA's Brief in Support of Cross-Exceptions at 3-7. Of course, PMA can be held responsible for its own actions. *See* 29 U.S.C. § 152(2) (including any "agent" of an employer within the definition of "employer"). Under *Wolf Trap*, however, PMA is not strictly responsible for union actions at the dispatch hall. 287 NLRB at 1040-41 (rejecting the existence of a principal-agent relationship between an employer and a labor organization because the "basic thesis for the whole of modern thought in this area is that the representative of the employees is not, cannot be, and must not be under the complete control of the employer.") Further, the GC's belated attempt to litigate such an important issue through a footnote in an answering brief strongly suggests awareness by the GC that the argument is improper. Surely, the issue of liability for the alleged unlawful conduct, if it were appropriate, would be important enough to warrant a position in the text of the GC's answering brief. Finally, the GC's assertion that a prior court of appeals decision "rejected [PMA's] argument once and for all" is inconsistent with the Board's policy of non-acquiescence. *See D.L. Baker, Inc.*, 351 NLRB 515, 529, n. 42 (2007).

and *must not* presume improper interference with employee rights. *Lutheran Heritage*, 343 NLRB at 646 (citing *Lafayette Park Hotel*, 326 NLRB 824, 825, 827 (1998)).

Plainly, Rule 12 is only intended to prohibit conduct that causes a disturbance in the dispatch hall or in "any other job-related area." It does not prohibit employees from engaging in dissident union speech, whether that takes the form of wearing an anti-union t-shirt as they leave their work shift (as the ALJ erroneously suggested) or whether that takes the form of filing grievances, distributing flyers, or circulating a decertification petition (as the GC unreasonably suggests in his reply brief). Wearing t-shirts as employees leave their work shift would not disrupt the dispatch process (which, by definition, occurs before employees begin their shift), nor would it interfere with work that is occurring in a job-related area.

The distinction between conduct that causes a disruption of work and speech that does not is a familiar one in labor law. For instance, in secondary boycott cases, the Board has drawn a distinction between *lawful* speech, such as peaceful handbilling and bannering, and *unlawful* conduct such as signal picketing, which is designed to "induce the employees to cease work or refuse to perform services." *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB 1290, 1293-94 (2011); *see also Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797, 805 (2010) ("Signal picketing is activity short of picketing through which a union intentionally, if implicitly, directs members not to work at the targeted premises."); *see also Kohn v. Southwest Regional Council of Carpenters*, 289 F. Supp. 2d 1155, 1165, n.5 (C.D. Cal. 2003) ("'[S]ignal picketing generally refers to activity designed to induce employees to strike, not activity designed to inspire a consumer boycott").

Similarly, the distribution of literature is protected by the Act when it occurs in non-work areas, but it can be lawfully prohibited in work areas. *See Stoddard-Quirk Manufacturing Co.*,

138 NLRB 615, 615-16, 621 (1962). Rule 12 is no different. It is a rule that, by its terms, is designed only to maintain order in the dispatch process and to prevent delays or interruptions in port operations. This is a presumptively lawful rule, just as a policy that prohibits employees from distributing union literature in working areas, or engaging in union-related solicitation during working time, is presumptively lawful even though it places some restrictions on the time, place and manner of protected speech. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945) (a rule prohibiting union solicitation during working time is presumptively lawful). In finding Rule 12 to be unlawful, the ALJ inappropriately applied the opposite presumption – a presumption that the rule is intended to interfere with Section 7 rights. *Lutheran Heritage*, 343 NLRB at 646 (the Board "must not presume improper interference with employee rights").

While the ALJ erred in her reading of the rule, the GC goes even farther in arguing that employees would interpret Rule 12 to be a categorical prohibition against all forms of dissident union speech, including the filing of grievances, the distribution of flyers, or the circulation of a decertification petition. This argument is not only an unreasonable reading of the rule; it is contrary to the ALJ's findings. The ALJ found that longshore workers "would reasonably understand that, as applied during the dispatch itself: (a) the rule is aimed at protecting the disruption of dispatch; and (b) they are permitted to engage in protected conduct during the dispatch without being found in violation of Rule 12, as long as they abide by the dispatcher's order to remain behind the yellow line." ALJD 23:34-41.[3]

If, as the ALJ found, workers would reasonably understand that Rule 12 is intended to prevent disruptions in the dispatch process, and that they are permitted to engage in dissident activities in the dispatch hall *during* dispatch as long as they do not disrupt the dispatch process,

[3] The GC did not except to the ALJ's finding on this point and, therefore, it is waived. *See* NLRB Rules and Regulations § 102.46 (b)(2) ("[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived").

then reason dictates that workers also would understand that they are permitted to engage in dissident activities in job-related areas as long as they do not disrupt work in those areas. The ALJ erred in not following her own findings to their logical conclusion, and the GC's more extreme interpretation of Rule 12 is foreclosed by his failure to except to her findings.

II. The GC Fails to Consider the Purpose and Collective Bargaining Context of Rule 12.

The GC dismisses as "irrelevant" the evidence concerning the history and application of Rule 12 and similar rules that have existed for decades in ports along the Pacific Coast. GC's Answering Brief at 5. This argument is contrary to Board law which holds that a rule must be interpreted in the context of its purpose, its historical application, and the industry in which the rule exists. *See Flagstaff Medical Center*, 357 NLRB 659, 662-63 (2011) (finding a no-photography rule lawful considering the purpose, historical application, and industry in the which the rule exists); *Mesa Vista Hospital*, 280 NLRB 298, 298 (1986) (finding restrictions on the wearing of union insignia in patient care areas are lawful when considered in context of the health care industry); *see also United Parcel Service*, 195 NLRB 441 (1972) (finding that a rule prohibiting the wearing of insignia by the employer's customer-facing drivers was lawful considering the lawful purpose for which it existed).

This context is all the more important here because Rule 12 is the product of collective bargaining – it is not, as in most rules cases, a unilaterally established employer rule. Therefore, it must be interpreted in light of its relationship to the collective bargaining agreement, the Pacific Coast Longshore Contract Document ("PCLCD"), and the "common law of the shop" under the PCLCD. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960)

(finding that a collective bargaining agreement must be interpreted in light of the "common law of the shop which implements and furnishes the context of the agreement").[4]

While evidence concerning the purpose and context of the rule is relevant under existing Board law, it would be even more relevant if the Board were to adopt the standard advocated by Member Miscimarra in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 18 (2016). We urge the Board do so here. *See* PMA's Brief in Support of Cross-Exceptions at 11.

Whether the *Lutheran Heritage* standard or the *William Beaumont* standard is applied, the history and context of Rule 12 is relevant and overwhelmingly demonstrates the rule's lawful purpose. The undisputed testimony of PMA Senior Coast Director of Contract Administration and Arbitration Bill Bartelson establishes that Rule 12, and similar rules that have existed for decades under the PCLCD, are jointly established and jointly administered by PMA and the International Longshore and Warehouse Union ("ILWU") in order to prevent longshore workers from engaging in conduct that delays the dispatch process or interrupts work in the ports. Tr. 1216:12-1218:19, 1225:25-1226:8; GC Ex. 2 (Sections 17.125 and 17.81 prohibit disruptions in dispatch and are applicable to all longshore workers);[5] PMA Ex. 8 (Section 9.252 of the Coastwise Rules prohibit Class B longshore workers from disrupting dispatch). As Mr.

[4] In addition to ignoring the record evidence concerning the purpose and context of Rule 12, the GC's arguments ignore the context of the cases he cites, *Purple Communications*, 361 NLRB No. 43 (2014), and *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996). Regarding the former, the GC argues that because a no-disruption rule was found to be unlawful in *Purple Communications*, Rule 12 should found to be unlawful as well. Of course, the GC ignores the context of the rule in *Purple Communications*, where the no-disruption rule appeared in an employee handbook in a non-union workplace, whereas Rule 12 was established through joint labor-management action in the context of a collective bargaining relationship that is as old as the Act itself. Similarly, the GC's argument that the analysis in *Aroostook County Ophthalmology* is not relevant to non-hospital cases ignores the very lesson therein – that *context matters*. The fact that the rule occurred in a hospital *is* the context that led the court to conclude that an otherwise overly broad rule was lawful.

[5] Even though Section 17.125 of the PCLCD uses language that is similar to Rule 12, *see* GC Ex. 2 at 85 (giving the JPLRCs the authority to investigate and adjudicate any complaint against any longshoreman whose conduct "on the job or in the dispatching hall, causes disruption . . ."), the GC has not argued that this contract language is unlawful or that employees would read it to prohibit peaceful dissident speech, as opposed to disruptive conduct. *See* GC's Answering Brief at 3, n.3.

Bartelson testified, Rule 12 and similar rules are intended to ensure the "timely arrival of labor to the job site so that operations can commence at collective bargained start times," and to avoid any disturbance or disruption that would "delay the dispatch, the time of dispatch." Tr. 1214:3-16; 1216:12-1218:7. According to the undisputed testimony of Mr. Bartelson, these dispatch rules prohibiting disruptions of dispatch have existed at ports along the Pacific Coast for 40 to 50 years. Tr. 1218:8-15.

The GC complains that the definition of "causing a disturbance" is "confusing" and does not give employees "notice or expectation of what kind of activity can be found to constitute a 'disturbance.'" GC's Answering Brief at 4. This argument ignores the "common law of the shop" under the PCLCD, which includes a long history of Joint Port Labor Relations Committee ("JPLRC") decisions which define the type of conduct that is prohibited by Rule 12 and similar rules under the PCLCD.

The GC claims that the historical application of Rule 12 was not litigated, *see* GC's Answering Brief at 5, but that is true only insofar as the GC failed to put on any evidence that would support his unreasonable interpretation of Rule 12. PMA did, however, litigate the issue and introduced substantial evidence – which the GC did not rebut – that illustrates the type of conduct has historically been prohibited under Rule 12 and similar rules under the PCLCD. This evidence included ten JPLRC decisions that define prohibited conduct to include workers fighting in the dispatch hall, workers refusing to remove themselves from the dispatch window after receiving a job assignment, workers banging on or breaking a dispatch window or vandalizing other dispatch property, and workers organizing an *en masse* walkout from the dispatch hall such that no jobs could be dispatched. Tr. 1214:6-16; PMA Exs. 9-18. In addition to conduct inside the dispatch hall, conduct outside of the dispatch hall has been prohibited when

it caused a disruption of the dispatch process inside the dispatch hall. *See* PMA Ex. 13 (finding a longshore worker guilty of disrupting the dispatch process when his selling of fireworks in the parking lot of the dispatch hall led to an evacuation of the dispatch hall by the fire department).[6]

The record is devoid of any evidence that Rule 12 – or any similar rule under the PCLCD – has been interpreted to prohibit peaceful dissident union speech inside or outside of the dispatch hall. Not one of the examples provided by Mr. Bartelson nor the ten instances of longshore workers being charged and/or disciplined for violating Rule 12 or similar rules under the PCLCD, involve (1) dissident union speech that occurred in the dispatch hall during non-dispatch; or (2) dissident union speech in a "job-related area" outside of the dispatch hall that did not actually disrupt work. PMA Exs. 9-18. The GC had the opportunity to introduce evidence that Rule 12 has been interpreted in the manner he claims, but he failed to do so.

Especially when considered in light of the undisputed evidence concerning the history and collective bargaining context of Rule 12, the only reasonable interpretation of the rule is that is a lawful restriction on conduct that disrupts the dispatch process or work in "job-related areas" in the Port. It is no different than a no-strike clause or any other collectively bargained waiver of the right to engage in concerted activity that disrupts work or operations. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (a union may waive its members' right to strike in return for economic benefits for employees); *see also Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455

[6] The GC attempts to minimize this evidence by arguing that the "alleged history was [never] passed on to the longshore employees at the Port of West Sacramento." GC's Answering Brief at 5. This sweeping statement is not supported by the evidence, however. In support of this statement, the GC cites only to PMA Labor Relations Administrator David Robinson's testimony that *he* is not aware that identified casual longshore workers had been told anything about Rule 12 other than the language of Rule 12. Tr. 958:23-25. This is not surprising since Mr. Robinson's office is located approximately 80 miles from the Port. Tr. 1522:4-1523:7. In any event, evidence concerning the parties' application of a collectively bargained rule is relevant to interpret the rule because it is evidence of a past practice that is as much a part of the rule as the text of the rule itself. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579-80 (1960) (explaining that there are far "too many unforeseeable contingencies" in a workplace to render the words of the contract the exclusive sources of rights and duties, and, as a result, the past practices that develop in the workplace are as much a part of the contractual relationship as the contract itself).

(1957) (same). There is no evidence to support the allegation that Rule 12 is intended to prohibit, or has ever been applied to prohibit, the types of dissident union speech that cannot be waived under *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974).

III. The GC Is Improperly Arguing a Different Theory of Violation Than the One Found by the ALJ.

The GC argues that Rule 12 is unlawful under the third prong of the *Lutheran Heritage* standard because, according to the GC, "Respondents indisputably applied the rule against Charging Party Roni Simisola when she exercised her Section 7 right to photograph the dispatch sheet." GC's Answering Brief at 4. This argument has been waived. The ALJ specifically concluded that Rule 12 had *not* been applied to restrict the Section 7 rights of any employee, including Simisola, and, therefore, Rule 12 is *not* unlawful under the third prong of *Lutheran Heritage*. *See* ALJD at 23:24-27 & n.36. Because the GC failed to except to the ALJ's finding in this regard, it has been waived and is not properly before the Board. NLRB Rules & Regulations 102.46(b)(2) ("[a]ny exception to a rule, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived").

In addition, as noted above, the GC's arguments with respect to the alleged overbreadth of Rule 12 (the first prong of the *Lutheran Heritage* standard) are also in conflict with the ALJ's finding that workers would reasonably understand that "as applied during the dispatch itself: (a) [Rule 12] is aimed at protecting the disruption of dispatch; and (b) they are permitted to engage in protected conduct during the dispatch without being found in violation of Rule 12, as long as they abide by the dispatcher's order to remain behind the yellow line." ALJD at 23:34-41. Again, because the GC did not except to this finding by the ALJ, he is precluded from raising the argument now.

In short, the GC cannot stray beyond the ALJ's interpretation of Rule 12. For the reasons we have explained above, the ALJ's interpretation is unreasonable because it improperly presumes an interference with employees' right to engage in dissident union speech and it is inconsistent with the undisputed record evidence concerning the lawful purpose, collective bargaining context, and historical application of the rule.

Respectfully submitted,

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